Supreme Court, U.S.
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No. 09-____ 09-818 DEC 29 2009

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In The

Supreme Court of the United States

IRENE ROMANIUK,

Petitioner,

v.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

On Petition For A Writ Of Certiorari To The Appellate Court Of Illinois, First Judicial District

PETITION FOR A WRIT OF CERTIORARI

Counsel for Petitioner:

KEVIN E. BRY
Counsel of Record
218 N. Jefferson St., Suite 102
Chicago, IL 60661
(312) 749-7400
Facsimile: (312)-559-1335

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether the trial court erred (and the Illinois Appellate Court erred in affirming) in dismissing Petitioner Irene Romaniuk's petition for post-conviction relief from her conviction for first-degree murder without an evidentiary hearing where the petition fairly alleged a substantial denial of her Sixth Amendment constitutional right to assistance of counsel as trial counsel, *inter alia*, failed to meaningfully present her *mens rea* defense by allowing improper rebuttal testimony and the dilution of her defense with a self-defense instruction, while not having investigated and presented important factual information with respect to that *mens rea* defense, and appellate counsel failed to raise these issues and the ineffectiveness of trial counsel on direct appeal.

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OPINION AND JUDGMENT BELOW

The trial court's ruling which denied Petitioner's petition for post-conviction relief, made December 7, 2007, was not written. The Illinois Appellate Court Order affirming the trial court, which was unpublished, was entered March 31, 2009, and is reprinted at App. 1-17. The Illinois Supreme Court's Order denying leave to appeal, unpublished, was entered September 30, 2009, and is reprinted at App. 35.

JURISDICTION

The Illinois Appellate Court (First Judicial District) affirmed the dismissal of Petitioner's post-conviction petition in an unpublished order on March 31, 2009. Petitioner timely filed a petition for leave to appeal to the Illinois Supreme Court, which was denied in an unpublished order on September 30, 2009. This petition is timely filed in that it is filed within 90 days of the Illinois Supreme Court's order denying leave to appeal, and jurisdiction is conferred by 28 U.S.C. section 1257(a).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The Illinois Post-Conviction Hearing Act (725 ILCS 5/122-1 et seq. (2003)), provides in pertinent part:

> (a) Any person imprisoned in the penitentiary who asserts that in the proceedings which resulted in his or her conviction there was a substantial denial of his or her rights under the Constitution of the United States or of the State of Illinois or both may institute a proceeding under this Article. 725 ILCS 5/122-1(a).
>
> * * *
>
> The court may receive proof by affidavits, depositions, oral testimony, or other evidence. In its discretion, the court may order the petitioner brought before the court for hearing. . . . 725 ILCS 5/122-6.

The Sixth Amendment to the United States Constitution provides in pertinent part:

> In all criminal prosecutions, the accused shall. . . . have the Assistance of Counsel for his defense. U.S. Const. amend. VI.

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> [N]or shall any State deprive any person of life, liberty, or property without due process of law. U.S. Const. amend. XIV.

STATEMENT OF THE CASE

Pre-trial and Trial Proceedings

Petitioner Irene Romaniuk was charged by indictment with first-degree murder under 725 ILCS

5/9-1. Defendant and the State litigated numerous pre-trial motions to quash and suppress (Trial Record ("C.") at 85-88, 231, 398-401), and pre-trial discovery was exchanged. However, the exchange of psychiatric discovery was informal, as no filed written answers detailing the exchange of psychiatric discovery pursuant to Illinois Supreme Court rule exists in the record. (Id. at 560.) In fact, the assistant State's attorney and defense counsel interviewed Petitioner's expert psychiatric witness in defense counsel's living room prior to trial. (Id. at 1325-26.) The case proceeded to jury trial, which took place December 9-12, 2002.

At trial, the State's case consisted primarily of the testimony of individuals who heard the incident and discovered the victim, the testimony of individuals indicating that Petitioner had been jealous of the victim and made perceived threats or negative comments about the victim in the weeks prior to the occurrence, the testimony of the severe injuries inflicted upon the decedent which caused death, and testimony and evidence of the police investigation and recovery of evidence indicating Petitioner's presence at the scene of the crime. C. at 651-1215.

From opening statement through closing argument, Petitioner's trial counsel did not contest her presence at the scene and that she had physically caused the death of the decedent. As counsel stated in opening statements: "We do not dispute the fact that Irene was in the apartment that day. That is not the issue here." (C. at 642.) Rather, counsel stressed that psychiatric testimony regarding the defendant's state

of mind would show that she could not control herself in light of a perceived assault or provocation. (Id. at 644, 649-50.) As counsel stated during closing argument: "This is not a case about who committed this homicide. It's a case about why." (Id. at 1418.) The defendant did not testify and no physical evidence was introduced by her attorneys.

Indeed, Petitioner's only witness was Dr. Alexander Obolsky, a psychiatrist who interviewed and tested Petitioner while she was incarcerated, reviewed records, and interviewed others. Dr. Obolsky testified at trial as an opinion witness as to Petitioner's state of mind at the time of the occurrence, on the issue of "*mens rea*." (C. at 1307-08.) Dr. Obolsky specifically rejected comments Petitioner had made to him regarding the victim having come at her with a knife, finding Petitioner not credible on her description of events after the struggle between the two ensued. Id. at 1292-96.

Dr. Obolsky instead opined that Petitioner was struggling under an unreasonable belief of the need for self-defense and was experiencing sudden and intense passion which resulted from a serious provocation on the victim's part. (C. at 1259-60, 1268.) These are the mitigating factors which under law provide that a first-degree murder is second-degree murder. 720 ILCS 5/9-2(a)(1) and (2).

The State called Dr. Susan Messina, a forensic psychologist who had examined defendant on behalf of the State to evaluate her sanity and fitness to

stand trial. (C. at 1345.) According to Dr. Messina, whose testimony was not objected to on the basis of its substance, she had subsequent to her initial meetings with and evaluation of Petitioner, evaluated records and formed an opinion as to the Petitioner's state of mind at the time of the offense. (Id. at 1345-47.) While Petitioner's counsel objected to Dr. Messina's testimony (Id. at 1347), it was on the basis that the state had failed to disclose the substance of Messina's opinions during pre-trial discovery. (Common Law Record ("C.R.") at 295.) According to Dr. Messina, defendant did not act in an unreasonable belief of the need for self-defense or as a result of a serious provocation leading to a sudden and intense passion on her part, as a result of being punched. (C. at 1347-48, 1360). Dr. Messina, too, found that Petitioner was not a reliable source. Id. at 1351.

At the instructions conference, defense counsel did not specifically ask for a self-defense instruction. The second-degree murder instruction, which set forth the law as provided at 720 ILCS 5/9(a)2, was given, and the trial court also provided the jury a self-defense instruction. (C. at 1397-1401.) This was despite the fact that counsel had indicated during trial that defendant did not expect to argue that she was not guilty of a crime. (Id. at 1337-41.) Both an instruction for self-defense and second-degree murder were given to the jury.

The jury returned a verdict of guilty of first-degree murder and the trial court sentenced Petitioner to a term of 45 years' imprisonment. The

Illinois Appellate Court (*People v. Romaniuk*, No. 1-03-0545) (unpublished order under Illinois Supreme Court Rule 23) affirmed her conviction and sentence, and subsequent petitions to the Illinois Supreme Court and to this Court were not accepted.

Post-Conviction Proceedings and Appeal

On October 14, 2005, Petitioner filed an initial Petition for Post-Conviction Relief, and on January 27, 2006, Petitioner filed an Amended Petition for Post-Conviction Relief. The petition as amended alleged incompetent trial and appellate counsel and newly discovered evidence. Specifically, the Amended Petition asserted that Petitioner's trial counsel: proceeded to trial knowing that Petitioner was not competent to aid or assist in her defense and counsel had failed to contest her fitness to stand trial by adequate preparation for and conduct of the fitness hearing before the trial court (Supplemental Record ("S.R.") Vol. 1 at 9-10); that counsel failed to properly handle and present a "*mens rea*" defense by informally and ineffectively conducting discovery, ineffectively allowing Dr. Messina to testify as to statements and information from her fitness examination of Petitioner at trial on the topic of the defendant's state of mind at the time of the crime, and allowing an abandoned defense instruction of self-defense to go to the jury; and failing to present mitigation evidence at the sentencing hearing. (Id. at 9-12.) The Amended Petition additionally raised what it termed "new evidence" of a scar on Petitioner's right breast which

had been inflicted by the victim but was ineffectively undiscovered by counsel. (Id. at 15.) Finally, the Amended Petition asserted that Petitioner's initial appellate counsel was ineffective in not raising, *inter alia*, the ineffectiveness of trial counsel, which was apparent from the record, and the error in Dr. Messina's testifying in violation of 725 ILCS 5/104-14 (the statute which prohibits the use of a defendant's statements at a fitness and/or insanity evaluation from being admissible where such matters are not at issue at trial). Id. at 16.

The Amended Petition, which first raised the federal and/or constitutional issues which are involved, was supported by Petitioner's post-conviction counsel's affidavit (S.R. at 17), the affidavits of Petitioner and her father and numerous letters from individuals and medical records bearing upon Petitioner's lack of awareness of matters generally during the time she was incarcerated leading to her trial, and in mitigation. Id. at 18-87.

The State filed a Motion to Dismiss, and on March 9, 2007, the trial court (and the same judge which presided over the initial trial) heard argument upon the Petition as amended. On December 7, 2007, the trial court dismissed Petitioner's Amended Petition without an evidentiary hearing thereon. Once again Petitioner appealed to the Illinois Appellate Court, which – via the same panel of justices which had disposed of Petitioner's initial petition by way of a Rule 23 order – affirmed by way of a Rule 23 order

on March 31, 2009 (*People v. Romaniuk*, No. 1-08-0041). (See App. 1-17.) Petitioner sought review in the Illinois Supreme Court; however, the Supreme Court of Illinois denied her petition for leave to appeal the appellate court's order on September 30, 2009. See App. 35.

ARGUMENT

Illinois' Post-Conviction Statute and Law Pertaining Thereto

Illinois' Post-Conviction Hearing Act provides, in pertinent part, as follows:

> (a) Any person imprisoned in the penitentiary who asserts that in the proceedings which resulted in his or her conviction there was a substantial denial of his or her rights under the Constitution of the United States or of the State of Illinois or both may institute a proceeding under this Article. 725 ILCS 5/122-1(a).
>
> * * *
>
> The court may receive proof by affidavits, depositions, oral testimony, or other evidence. In its discretion, the court may order the petitioner brought before the court for hearing. . . . 725 ILCS 5/122-6.

The Post-Conviction Hearing Act (725 ILCS 5/122-1 et seq.) (hereinafter generally the "Act") provides a mechanism whereby a criminal defendant

may challenge his conviction and/or sentence when there has been a substantial denial of his or her rights under the United States Constitution, Illinois Constitution, or both. *People v. Turner*, 337 Ill. App. 3d 80, 84, 785 N.E.2d 879, 883 (2003). The Act provides a collateral remedy for violations of either federal or state constitutional law. *People v. Nunez*, 325 Ill. App. 3d 35, 756 N.E.2d 941 (2001). To be entitled to post-conviction relief, a defendant bears the burden of establishing a substantial deprivation of federal or state constitutional rights in the proceedings that produced the judgment being challenged. *People v. Morgan*, 187 Ill. 2d 500, 528, 719 N.E.2d 681 (1999). In non-death penalty cases, the Act provides a three-stage process for adjudicating a petition for post-conviction relief. *People v. Robinson*, 343 Ill. App. 3d 910, 916-17, 799 N.E.2d 345 (2003).

The instant matter involved the dismissal of Petitioner's petition at the second stage of the process, whereby the State is entitled to file a motion to dismiss the petition. 725 ILCS 5/122-5. As the court explained in *People v. Turner*, 337 Ill. App. 3d 80, 91, 785 N.E.2d 883, 889 (2003):

> [A] defendant is not entitled to a post-conviction evidentiary hearing unless the allegations set forth in the petition, as supported by the trial record or accompanying affidavits, make a substantial showing of a constitutional violation. [Citation.] In making this determination, all well-pleaded facts in the petition and affidavits are to be taken

> as true, but non-factual and non-specific assertions which merely amount to conclusions are not sufficient to require a hearing under the Act. [citing *People v. Coleman*, 183 Ill. 2d 366, 381, 701 N.E.2d 1063 (1998).]. . . . On appeal, the [dismissal of a] petition without an evidentiary hearing is subject to plenary review. [Citation.]

Right to Effective Assistance of Counsel

The right to effective assistance of counsel is of constitutional dimension, as the Sixth Amendment to the United States Constitution provides in pertinent part:

> In all criminal prosecutions, the accused shall. . . . have the Assistance of Counsel for his defense. U.S. Const. amend. VI.

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> [N]or shall any State deprive any person of life, liberty, or property without due process of law. U.S. Const. amend. XIV.

The Constitution of the State of Illinois additionally guarantees a criminal defendant effective assistance of counsel. See Ill. Const. 1970 Art. I, section 8.

The Seventh Circuit Court of Appeals recently set forth the nature and elements of a claim for ineffective assistance of counsel. In *Watson v. Anglin*, 560 F.3d 687, 690 (7th Cir. 2009), the court explained:

> The Sixth Amendment guarantees criminal defendants the right to effective assistance of counsel. See *Hill v. Lockhart*, 474 U.S. 52, 57, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985); *Strickland v. Washington*, 466 U.S. 668, 684-85, 104 S.Ct. 2052, 80 L.Ed. 2d 674 (1984) ("The Sixth Amendment recognized the right to the assistance of counsel because it envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results. An accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair.") To prevail on an ineffective assistance claim, a petitioner must prove both (1) that his counsel's performance was objectively unreasonable and (2) that he suffered prejudice as a result. [Citation. . . .]

Petitioner is aware that there is a strong presumption that underlying counsel's performance falls within the wide range of professional assistance. See *Knowles v. Mirzayance,* 129 S.Ct. 1411, 1421, 173 L.Ed. 251 (2009), citing *Strickland*, 466 U.S. at 689, 104 S.Ct. at 2052, 80 L.Ed. 2d 684 (1984). Petitioner is also aware that decisions as to whether a defendant will pursue a self-defense defense at trial, on the one hand, or concede that a crime has been committed and seek a lesser-included offense verdict, or – in a rare case perhaps – both are not easy decisions to make. Merely because a strategy was unsuccessful does not mean that counsel was ineffective. See *People v. Walton*, 378 Ill. App. 3d 580, 880 N.E.2d 993

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(2005). However, the deference which the courts show counsels' strategic decisions presupposes that the attorneys have knowledge based upon adequate investigation and research, of the pertinent facts and the law which govern the attorneys' conduct and ensure criminal defendants a meaningful and constitutional defense.

Application of Law to this Case

In the case *sub judice*, counsel was inadequately prepared both as to the facts and as to the law, and the considerable discretion counsel had was not properly exercised. In light of substantial evidence (including physical evidence and results of DNA testing) which showed that Petitioner was at the scene of the decedent's death, a defense that Petitioner was not present was rightfully not pursued. Repeatedly, Petitioner's trial counsel indicated that he would not be claiming that the Petitioner was not present. Moreover, counsel indicated that Petitioner would likely not pursue a defense which claimed that Petitioner had not committed a crime (such as either not having committed the acts which led to death or not having justifiably used force as the affirmative defense of self-defense would provide). Indeed, Petitioner's one and only witness in her case, psychiatrist Alexander Obolsky, undermined any viable self-defense theory when he testified that Petitioner's response was disproportional ("overkill" was a word used) and that she was not reliable with respect to what happened once the struggle with the decedent ensued. (C. at

1259-1307.) (Self-defense, of course, requires generally that a defendant only use the amount of force necessary under the circumstances.) See 720 ILCS 5/7-1.

Yet despite the fact that there was no viable self-defense case presented, (and for the moment Petitioner puts aside counsel's failure to discover the scar Petitioner received from the victim as a result of being cut with a knife), counsel allowed the trial court, it would appear *sua sponte*, to instruct the jury as to a self-defense theory. Given the absolute failure of the record to support this theory, (Petitioner did not testify and the second-hand accounts of Petitioner that there had been a struggle were discounted and it was claimed by both Obolsky and Messina that Petitioner's reaction was an overreaction to any physical provocation by the victim), a self-defense instruction can only have confused or alienated the jury.

Not only did trial counsel allow the jury to consider an abandoned and undeveloped defense, but it allowed the erroneous testimony of Dr. Messina to undercut the second-degree murder defense which *was at issue* by the improper testimony of Dr. Messina. The statute which disabled such testimony is neither esoteric nor difficult to comprehend. 725 ILCS 5/104-14 provides, in pertinent part: "Statements made by the defendant and information gathered in the course of any examination or treatment ordered [under 725 ILCS 5/104-13, 17 or 20] shall not be admissible against the defendant unless he raises the defense of insanity or the defense of drugged or

intoxicated condition. . . ." As the court explained in *People v. Sutton*, 316 Ill. App. 3d 874, 739 N.E.2d 542 (2000): "The fitness statute was not designed as an investigative tool to further criminal prosecution by providing information, incriminating or otherwise, to be used against a defendant who is being examined by a psychiatrist to resolve fitness or insanity issues."

As the appellate court below noted, Petitioner did not raise the defense of insanity or drugged or intoxicated condition, and the testimony of Dr. Messina was therefore not properly admissible. (Appendix A, Order of March 31, 2009, at 10.) However, the appellate court went on to both erroneously analyze the record and unwarrantedly assume and hold that there was no prejudice to Petitioner. As to the inaccurate analysis of the record, the appellate court concluded that counsel was not ineffective because it had actually objected to the testimony. (Id.) Yet the record reveals that counsel ineffectively did not object on the basis that the testimony was inadmissible substantively, but rather only objected due to a claim (which the trial court rejected) that the State had failed to disclose the substance of the testimony in pre-trial discovery. (See C. at 295.) Thus, counsel thoroughly failed to see that inadmissible, prejudicial testimony was kept from the jury on the major issue of the case. The Seventh Circuit Court of Appeals recently noted, however, that: "All lawyers that represent criminal defendants are expected to know the laws applicable to their client's defense." *Osagiede v. United States*, 543 F.3d 399, 409 (7th Cir. 2008).

The appellate court additionally held that "**even without** Dr. Messina's testimony, there was overwhelming evidence establishing defendant was guilty of first degree murder." (Appendix A, Order of March 31, 2009, at 10.) (Emphasis added.) Petitioner is constrained to note that the issue is not whether the State proved their case in the absence of the concededly improper testimony, as it might be were Petitioner arguing she was not convicted beyond a reasonable doubt or that cumulative inadmissible evidence was introduced, but rather, whether that erroneously admitted testimony (in addition to other errors at trial occasioned by counsel's ineffectiveness) was prejudicial to the defendant. The "overwhelming" evidence the court pointed out consisted largely of the evidence of the injuries to the victim and the evidence of the presence of Petitioner at the scene (which was not in dispute in a case which hinged entirely on Petitioner's state of mind at the time) and the following three anecdotal comments or queries of the Petitioner in the weeks or months prior to the incident, to wit: 1) that Petitioner had once threatened to "gut" the victim, 2) that Petitioner asked a friend of hers if the friend knew anyone who could "take care of somebody," and 3) that Petitioner asked another individual if he knew someone who could help her take care of a girl that was bothering Petitioner. Id. Petitioner submits that such evidence is vague and/or ambiguous, as revealed by the fact that the individuals to whom the comments were directed did nothing to follow up on the comments. Indeed, one witness "kind of laughed because there [was] more

than one way someone could be taken care of." (C. at 976) and these statements are hardly overwhelming on the question of *mens rea*.

Given that had Messina not testified, Petitioner's case would have presented to the jury the only expert opinion testimony on the only real contested issue at trial – Petitioner's state of mind at the time of the offense – it is difficult to accept the appellate court's conclusion that the admission of Dr. Messina's incompetent testimony did not prejudice Petitioner. It would likely have made a great difference, to wit, the difference between a verdict finding Petitioner guilty of first-degree murder and second-degree murder.

There was more alleged to be ineffective than the failure to meaningfully pursue and protect a consistent and warranted theory for the defendant. The Amended Petition for Post-conviction Relief set forth a true laundry list of some 23 different psychotropic drugs which Petitioner was on while incarcerated and awaiting or at trial which interfered with Petitioner's ability to prepare for her trial, and this caused, *inter alia*, the inability of Petitioner to share the existence of the scar which – for the purposes of the post-conviction motion to dismiss – assumed to have been inflicted by the decedent. There was effectively no contest of the finding that she was fit for trial, as counsel offered to stipulate to reports, the State's expert, Dr. Henry was not subjected to rigorous cross-examination, and counsel procured no contrary evidence and did not seek an independent evaluation. (See C. at 461, 489-93.) The effect of the medication

upon Petitioner should be flushed out at hearing, particularly where the experts who examined Petitioner when she was incarcerated found her to be severely mentally ill and not always reliable in her statements. For the purposes of the State's Motion to Dismiss the Amended Petition, its harmful effect upon Petitioner should have been accepted as true.

New evidence of a scar on Petitioner's right breast which had been inflicted by the victim but was ineffectively undiscovered by counsel, was brought before the court. (C.R. Vol. 1 of 1, at 15, 19-21.) The appellate court, like the trial court, concluded that the scar was "of a minor nature," (App. 10, Order of March 31, 2009, at 10) and despite the fact that Petitioner alleged that an inability to comprehend and assist in her defense, concluded that she had not established the scar had not been discovered after the trial. These conclusions amount to fact-finding which is not proper when ruling on a motion to dismiss a post-conviction petition, since the allegations on such a petition are assumed to be true.

And the existence of the scar is critical for purposes of the evaluation of whether an evidentiary hearing should have been conducted. As stated *supra*, there was no evidence of a physical nature that Petitioner acted in self-defense at trial, whether reasonably (and thus evidence of self-defense as an affirmative defense) or unreasonably (and thus bearing both upon the prong of the lesser-included defense of second-degree murder with respect to an unreasonable belief in the need for self-defense and

sudden and intense passion as a result of provocation). Both Petitioner's expert witness Dr. Obolsky and the State's invalid expert witness, Dr. Messina, discounted the need for Petitioner to physically strike out at the victim in the overwhelming manner she did. However, the existence of a scar inflicted by the decedent upon Petitioner – which is accepted as true for the purposes of whether an evidentiary hearing should have been conducted – could well have borne upon Obolsky's legitimate opinions, and upon the jury's opinion of whether Petitioner was guilty of first-degree murder, second-degree murder or she acted in self-defense. (Not only might the witness or the jury have concluded that the decedent having struck at Petitioner was germane to Petitioner's self-defense claim or to her second-degree murder mitigation claims, but counsel may have conducted a completely different trial, including one where Petitioner testified on her own behalf.)

It is axiomatic that a criminal defendant is entitled to effective assistance of counsel on appeal (see *People v. Towns*, 182 Ill. 2d 491, 696 N.E.2d 1198 (1998)). Here, Petitioner's initial appellate counsel also failed to raise the inadmissibility of Dr. Messina's testimony and the ineffective handling of the *mens rea* defense and other errors at and after trial, and this, too was actionable and should have been the subject of an evidentiary hearing.

Post-conviction proceedings are vital to the administration of justice and an important tool at

rooting out an unconstitutional deprivation of effective assistance of counsel. Petitioner is aware that such proceedings may be looked at with disfavor since the actual trial and initial appeal, if any, are concluded and post-conviction proceedings represent a collateral attack upon a criminal conviction and/or sentence. Yet, for post-conviction statutory schemes to have meaning, the procedures must be followed. Petitioner's Amended petition survived the first stage of such proceedings in Illinois, as it was not dismissed as frivolous. While the State filed a motion to dismiss, the grounds raised and relied upon by the trial court and appellate court amounted to nothing more than disagreeing with and discounting Petitioner's facts (when those are to be taken as true) and their prejudicial effect on the Petitioner. Petitioner was denied an evidentiary hearing in which to develop and amplify and explain, to show physical evidence such as the scar, (and to state how this had been inflicted upon her), and to perhaps develop with expert medical testimony the effect of some 23 different psychotropic drugs. This Court should grant the instant petition to make clear the vital and proper role of post-conviction proceedings generally and to preserve and protect the guarantees of effective assistance of counsel.

CONCLUSION

Petitioner Irene Romaniuk respectfully requests that this Honorable Court grant this petition and issue a writ of certiorari to vacate or review the judgment of the Illinois Appellate Court, remand for consideration and/or grant Petitioner such other relief as is just and proper.

Respectfully submitted,

Counsel for Petitioner:

KEVIN E. BRY
Counsel of Record
LAW OFFICES OF KEVIN BRY
218 N. Jefferson St., Suite 102
Chicago, IL 60661
(312) 749-7400

APPENDIX A

FOURTH DIVISION
March 31, 2009

No. 1-08-0041

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. IRENE ROMANIUK, Defendant-Appellant.	Appeal from the Circuit Court of Cook County. No. 00 CR 25338 Honorable Thomas Fecarotta, Judge Presiding

ORDER

Defendant, Irene Romaniuk, appeals the order of the circuit court dismissing her post-conviction petition without an evidentiary hearing. On appeal, defendant contends the trial court erred in dismissing her petition because she made a substantial showing: (1) her trial and appellate counsels provided ineffective assistance; and (2) new evidence in the form of a scar on her breast supports her contention she acted in self-defense. We affirm.

At the hearings on defendant's motions to quash arrest and suppress evidence, investigator Nicholas Pecora testified that on September 28, 2000, he responded to a 911 call by Stephen Hudson. When

Officer Pecora arrived at Mr. Hudson's apartment in the Tanglewood complex in Arlington Heights, he saw the victim Kristen Popelka, lying on her back in the kitchen. Officer Pecora testified that evidence technicians found shoe prints containing a chevron pattern in the blood on the kitchen's tile floor, and a cosmetic fingernail containing blood Officer Pecora asked Mr. Hudson who would want to harm the victim. Mr. Hudson responded that defendant, with whom he had recently broken off a relationship, was the only person he could think of who would want to harm her. Mr. Hudson provided Officer Pecora with defendant's photograph and told him defendant drove a white, two-door Lexus.

Illinois State Police Sergeant Joseph Micci testified that he worked with the major case assistance team (MCAT) and was investigating the victim's murder. On September 28, 2000, Sergeant Micci and another officer maintained surveillance of defendant's apartment building in Chicago. At approximately 3:20 p.m., Sergeant Micci observed defendant and her mother walk from a gangway between two apartment buildings. As the two women approached, Sergeant Micci and his partner identified themselves and asked the women if they could speak with them. Sergeant Micci then asked both women for identification. As defendant removed her driver's license from her wallet, Sergeant Micci noticed a medium-size amount of cash, later determined to be $8,000, inside the wallet.

Sergeant Micci returned defendant's driver's license and stated that Arlington Heights police wanted to speak with her. Neither Sergeant Micci nor his partner revealed to defendant that they were investigating a homicide. When defendant asked if she could call her father, Sergeant Micci told her he did not have a phone with him. Sergeant Micci agreed to defendant's request that her mother accompany her to the police station.

Sergeant Micci testified that neither he nor any other officer told defendant she had to go to the police station. Defendant and her mother entered the unmarked, uncaged car unassisted. The doors remained unlocked. Sergeant Micci told the transporting officers to place the purses of defendant and her mother into the trunk because of the money contained in defendant's wallet. Neither defendant nor her mother requested a lawyer.

Officer Sales testified that he was working with the MCAT team on September 29, 2000. He and Officer Brady arrived at defendant's apartment building that day where they met with Sergeant Micci and his partner, who were speaking with two females. Officer Sales heard Sergeant Micci ask defendant if she would accompany them to the police station and heard defendant's mother ask if she could go with defendant. Officer Sales testified that no one grabbed defendant or her mother, or otherwise forced the women into the police car. Defendant's purse and her mother's purse were placed in the trunk of the police car during transport to the police station. Officer

Sales stated that neither defendant nor her mother said they did not want to accompany the officers, and at no time were the women handcuffed. No one in his presence conducted a patdown of the women.

Officer Brady testified that he transported defendant and her mother to the police station on September 29, 2000. He stated that before transport, he asked defendant if he could search her purse for safety purposes, and defendant consented. When he looked in the purse, Officer Brady noticed a large amount of cash and asked why she had that amount of money. Defendant responded that the money was for her divorce. After finding no weapons, Officer Brady placed defendant's purse in the trunk of his car.

Defendant testified at the hearing that on September 29, 2000, she and her mother were walking through the parking lot of defendant's apartment building when two officers approached them. They asked defendant if she was Irene Romaniuk and then asked for her identification, which they took from her. When defendant asked the officers what they wanted, they responded that they were investigating a homicide. The officers told them to walk to the police car and the officers searched both of their purses. Defendant stated that the officers patted her stomach and searched the pouch she was wearing, as well as her wallet inside the pouch. Defendant asked the officers if she could call her father or her divorce attorney on the cell phone they found in her purse,

but they refused permission. Another officer grabbed her right hand and forced her into the car.

Mrs. Romaniuk, defendant's mother, also testified at the hearing. She testified that one of the officers took defendant's car keys and announced that he was going to search defendant's car. She observed the officer open the trunk of the car, search the trunk and then enter the car on the driver's side. Mrs. Romaniuk stated that when two other officers arrived, they patted down defendant and searched the pouch she wore under her sweatshirt. The police then placed the purses and the pouch into the police car trunk. Mrs. Romaniuk testified that one of the officers grabbed defendant by the arm and told her that she was coming with them, and then told Mrs. Romaniuk that she could accompany them. When they arrived at the police station, she and defendant were placed in separate rooms.

After the hearings, the trial court denied defendant's motions to quash arrest and suppress evidence. Prior to trial, defendant's trial counsel requested that a psychiatrist, Doctor Alexander Obolsky, be allowed to visit defendant for an evaluation, which the trial court granted. The trial court eventually also issued an order to have defendant examined by the forensic clinical services unit of the circuit court of Cook County to determine defendant's sanity and fitness to stand trial. On November 18, 2002, the report of Doctor Stafford Henry from the forensic clinical services unit was filed indicating defendant was fit to stand trial with medication and was legally sane. At a

fitness hearing on December 3, 2002, Doctor Henry testified defendant was fit to stand trial on medication. Doctor Henry further testified that another psychologist in his office, Doctor Susan Messina, also had evaluated defendant and determined she was fit to stand trial. The trial court found defendant fit to stand trial.

At trial, Mr. Hudson testified that on September 28, 2000, he lived in the Tanglewood apartment complex with the victim, Kristen Popelka. In May or June of 2000, Mr. Hudson also had developed a relationship with defendant. In August 2000, while he and defendant were having lunch at a restaurant, Mr. Hudson encountered defendant's husband, Tom Truduj. Mr. Hudson had not known defendant was married. After the encounter, Mr. Hudson attempted to break off his relationship with defendant, but defendant called him on his cell phone all day and told him, "Nothing is going to get between us. If she gets between us, I'll gut that bitch." Mr. Hudson testified that when he returned to the apartment at approximately 10 a.m. on September 28, 2000, he found the victim lying on the kitchen floor, covered in blood with something over her face.

Angel Salinas, a neighbor of the victim, testified that at approximately 7:30 a.m., to 7:40 a.m. on September 28, 2000, he heard the entrance door open. When he opened the door of his apartment, he saw a blond female, who was dressed in blue jogging clothes and a cap, walk by the apartment. A couple of minutes later, Salinas heard screams coming from the

victim's apartment. When he went to the door of the victim's apartment, he heard a female saying, "How much money do you want?" in a low, dying voice.

Christina Sobczyk testified that she and defendant have been friends for six months. During the second week of September 2000, Ms. Sobczyk was a passenger in defendant's car when defendant drove to the victim's apartment complex to confront the victim about her relationship with Mr. Hudson. Ms. Sobczyk also stated defendant had once asked her whether she knew of anyone who could help defendant "take care of somebody."

Officer Pecora testified at trial that he interviewed defendant at the police station on September 29, 2000. Officer Pecora told defendant only that he was investigating an incident that occurred the day before, and that her name arose as someone who may have some information. After defendant summarized her activities on the previous day, she told Officer Pecora, "I don't know what you want me to say, I didn't hurt anybody." Pecora had not told defendant anybody was hurt. Officer Pecora also noticed defendant sat with her right hand under her right thigh. After Officer Pecora advised defendant of her *Miranda* rights, defendant stated that she was tired but agreed to speak with him.

Officer Pecora asked defendant to show him her right hand, and defendant became reluctant. When defendant displayed her fingers, Officer Pecora noticed that the right ring finger and middle finger

had bandaids around the nail area, and that blood was oozing from under the bandaid. Officer Pecora also observed that the pinky and ring fingers of defendant's left hand had cosmetic nail applications that appeared to have been torn off. The other fingers on defendant's hands had a French manicure on the nails. When Officer Pecora asked defendant what had happened to her fingernails, she responded that she was injured in a "garbage disposal mishap." Officer Pecora told defendant that a cosmetic fingernail that appeared to match defendant's french manicured nails was found at the crime scene, and defendant stated that she and Mr. Hudson frequently wrestled in the apartment and she lost many fingernails as a result.

Sergeant Micci and Officer Brady also testified at trial, and their testimony was substantially the same as the testimony they gave at the hearings on defendant's motions to quash arrest and suppress evidence.

A cosmetic fingernail recovered from the scene, as well as a kitchen tile and front door knob, tested positive for blood. A piece of tissue paper found in defendant's Lexus also tested positive for blood. DNA testing performed on the evidence revealed that the DNA on the tissue paper matched the victim's DNA profile. The DNA on the exterior of the cosmetic fingernail matched the victim's profile, and the interior of the fingernail contained a DNA mixture consistent with the profiles of the victim and defendant.

The door knob contained a DNA mixture consistent with defendant's profile.

Doctor Joseph Cogan performed the autopsy on the victim that revealed she suffered 45 injuries to her head and neck consistent with having been made by the claw of a hammer. The victim's teeth were chipped, and she had other penetrating wounds similar to stab wounds on her body. Doctor Cogan stated that the victim died as a result of multiple injuries and the manner of death was homicide.

Doctor Obolsky, a privately retained psychiatrist, testified for the defense. Doctor Obolsky concluded defendant suffered from a depressive personality, anxiety and chronic pain disorders. Although Doctor Obolsky concluded defendant was not insane on September 28, 2000, she did have an unreasonable belief of self-defense and experienced sudden and intense passion as a result of the victim's provocation. In rebuttal, the State called Doctor Messina, a clinical psychologist employed by Cook County Forensic Clinical Services. After interviewing defendant and reviewing papers, Doctor Messina concluded defendant suffered from an adjustment disorder with mood anxiety and depressed mood. Doctor Messina found no evidence of abuse. She also opined defendant was not acting in self-defense at the time of the incident and defendant gave no indication that she felt her life was in danger or that she feared for her safety.

The jury found defendant guilty of first-degree murder and the trial court sentenced her to 45 years' imprisonment. Defendant filed a timely appeal, and this court affirmed her conviction and sentence in *People v. Romaniuk*, No. 1-03-0545 (2004) (unpublished order under Supreme Court Rule 23). Defendant filed an amended petition for post-conviction relief on January 27, 2006. The trial court dismissed defendant's petition without an evidentiary hearing on December 7, 2007. Defendant filed this timely appeal.

First, defendant contends the trial court erred in dismissing her petition at the second stage of proceedings because she made a substantial showing that her trial counsel provided ineffective assistance. A post-conviction proceeding "is not an appeal of a defendant's underlying judgment. Rather, it is a collateral attack on the judgment." *People v. Evans*, 186 Ill. 2d 83, 89 (1999). Such a proceeding "allow[s] inquiry into constitutional issues relating to the conviction or sentence that were not, and could not have been, determined on direct appeal." *People v. Barrow*, 195 Ill. 2d 506, 519 (2001). In the first stage, the trial court determines whether the petition is "frivolous" or "patently without merit." 725 ILCS 5/122-2.1 (West 2004). If the post-conviction petition is not so dismissed, it advances to the second stage where the trial court must determine whether the petition and any accompanying documents make a substantial showing of a constitutional violation.

See *People v. Coleman*, 183 Ill. 2d 366, 381 (1998). If the petition fails to make a substantial showing of a constitutional violation, it is dismissed; if such a showing is made, the post-conviction petition advances to the third stage where the trial court conducts an evidentiary hearing. 725 ILCS 5/122-6 (West 2004). "In determining whether to grant an evidentiary hearing, all well-pleaded facts in the petition and in accompanying affidavits are taken as true." *People v. Orange*, 195 Ill. 2d 437, 448 (2001). Dismissal of a post-conviction petition is reviewed *de novo*. *Coleman*, 183 Ill. 2d at 389.

To succeed on a claim of ineffective assistance of counsel, defendant must show that counsel's performance fell below an objective standard of reasonableness, and that she was prejudiced thereby. *People v. Griffin*, 178 Ill. 2d 65, 73-74 (1997). To establish prejudice, defendant must demonstrate a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different. *Griffin*, 178 Ill. 2d at 74. In general, counsel's trial strategy is "virtually unchallengeable" and will not support a claim of ineffective assistance of counsel. *People v. Palmer*, 162 Ill. 2d 465, 476 (1994).

Defendant claims her trial counsel was ineffective for failing to object to the testimony of Doctor Messina, who testified to information gathered during the court-ordered fitness examination and opined defendant was not acting in self-defense or sudden passion at the time of the killing. Section 104-14 of the Code of Criminal Procedure provides that

information gathered during the course of such a court-ordered fitness examination "shall not be admissible against the defendant unless he raises the defense of insanity or the, defense of drugged or intoxicated condition, in which case they shall be admissible only on the issue of whether he was insane, drugged, or intoxicated." 725 ILCS 5/104-14 (West 2004).

In the present case, defendant did not raise the defense of insanity or the defense of drugged or intoxicated condition, and therefore Doctor Messina's testimony was not properly admissible. Defendant contends her trial counsel was ineffective for failing to object to Doctor Messina's testimony.

Defendant's claim of ineffective assistance fails, because the record indicates that defense counsel *did* raise an objection to Doctor Messina's testimony. Further, defendant's claim of ineffective assistance fails because she has not shown any prejudice. Even without Doctor Messina's testimony, there was overwhelming evidence establishing defendant was guilty of first-degree murder. Mr. Hudson testified defendant had once threatened to "gut" the victim if she interfered with defendant's relationship with Mr. Hudson. Christina Sobczyk, a friend of defendant, testified that she once accompanied defendant to the victim's apartment complex so defendant could confront the victim about her relationship with Mr. Hudson. Ms. Sobczyk testified defendant had once asked her whether she knew of anyone who could help the defendant "take care of somebody." Mr.

Salvatore Sottile also testified defendant previously had asked him whether he knew anyone who could help defendant "take care of [a] girl that was bothering her." A piece of tissue paper found in defendant's car contained blood matching that of the victim. A fingernail found near the victim contained a DNA mixture with the profiles of both defendant and the victim. Officer Pecora testified to the injuries to defendant's fingernails. The victim suffered 45 injuries to the head and neck area. The victim's skull was fractured and her brain injured. Even if Doctor Messina's testimony had not been admitted, there is no reasonable probability that the jury's verdict would have been different. Since defendant was not prejudiced by the admission of Doctor Messina's testimony, her claim of ineffective assistance of trial counsel regarding this issue cannot stand.

Next, defendant argues her trial counsel provided ineffective assistance when he abandoned the theory of self-defense at trial. Defendant's claim of ineffective assistance fails, as there is no reasonable probability that the jury's verdict would have been different had counsel pursued the theory of self-defense. As discussed above, defendant's claim that she acted in self-defense was belied by her prior threats against the victim and the amount and severity of the victim's injuries. Defense counsel was not ineffective for failing to pursue a self-defense theory that was unsupported by the evidence.

Next, defendant contends her trial counsel was ineffective for failing to investigate defendant's

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"obvious[,] * * * drug and communication problem." In support, defendant attached to her post-conviction petition affidavits from herself and her father, indicating therein that during her incarceration, defendant was over-medicated and unable to cooperate with her attorneys. Defendant's contention is contradicted by the record at trial, when the court questioned defendant regarding her decision not to testify. The trial court asked defendant whether she understood that she had a right to testify on her behalf, whether it was her intention not to testify, and whether she understood that her decision not to testify must be hers alone. Defendant indicated that she was not going to testify and that she understood that the decision was hers to make. The trial court again asked whether the defendant understood that she alone was to make the decision as to whether to testify; defendant again indicated that she understood. Defendant's responses to the trial court gave no indication of any type of "communication" problem.

In addition, a fitness hearing was held, after which the trial court found defendant was fit to stand trial while on medication. Such a finding further belies defendant's argument that she was unable to communicate with counsel.

Defendant contends her counsel was ineffective for stipulating to the reports and examination of defendant by Cermak Hospital, and for engaging in "virtually no cross-examination of Dr. Henry at the fitness hearing." Defendant's contentions fail, where our review of the record indicates that counsel

adequately cross-examined Doctor Henry regarding the records he had reviewed, his observations of the defendant, the medications defendant was taking, and whether defendant suffered from a mood disorder or an impulsivity disorder. Counsel's conduct in stipulating to the medical reports and cross-examining Doctor Henry during the fitness hearing did not constitute ineffective assistance. See also *People v. Burton*, 184 Ill. 2d 1, 17 (1998) (holding that parties may stipulate to the opinion testimony of psychiatrists at a fitness hearing.)

Next, defendant contends her counsel was ineffective during the sentencing hearing for failing to present letters from friends and family members as to her good character. During the sentencing hearing, counsel presented an addendum to the pre-sentence report detailing defendant's academic record, her religious courses, her family and medical history. Counsel also argued defendant had no criminal history, that the crime had been committed out of passion and under extreme emotional disturbance and not out of greed or avarice, defendant had been battered by her husband near the time of the crime, and that the circumstances of the crime were unlikely to reoccur. In imposing the 45-year sentence, the trial court noted defendant had no criminal background and stated that it had considered the testimony and argument regarding defendant's mental state. The letters written by defendant's friends and family members, which pointed out these same facts regarding her lack of a criminal background and

asked for mercy, were largely cumulative to the evidence and arguments that the court already was considering. Defendant's claim of ineffective assistance fails, as there is no reasonable probability defendant's sentence would have been different even if counsel had presented the letters.

Next, defendant argues she is entitled to an evidentiary hearing on her post-conviction petition because "new" evidence in the form of a scar on her breast supports her contention that she acted in self-defense. Defendant also contends her trial counsel was ineffective for failing to discover her scar. The discovery of new evidence warrants a new trial when: (1) it was discovered only after trial; (2) its character is such that it could not have been discovered before trial through due diligence; (3) it is material to the issue; and (4) its character is such that it will probably change the outcome on retrial. *People v. Molstad*, 101 Ill. 2d 128, 134 (1984). Defendant does not establish she discovered the scar after trial. Nor does she establish how counsel was supposed to discover the scar, in the absence of any evidence she ever complained about the scar or sought medical treatment therefor. Further, as noted by the trial court and reflected in a photograph in the record on appeal, the sear was of a minor nature. Given all the evidence against defendant, the outcome of the trial would not have been different even if the jury had been presented with evidence of defendant's scar. See our discussion above. Defendant's argument fails.

Defendant lists several other issues that she claims need to be resolved at an evidentiary hearing. Defendant provides no argument or case law in support thereof, and therefore has waived review. See R.341(h)(7)(210 Ill. 2d R. 341(h)(7)).

Finally, defendant contends her appellate counsel was ineffective for failing to raise on direct appeal the issues of the State's use of inadmissible evidence, trial counsel's abandonment of the self-defense argument, and trial counsel's failure to present mitigation evidence at sentencing. Since we have already found these issues to be without merit, "defendant obviously suffered no prejudice due to appellate counsel's failure to raise them on direct appeal." *People v. Coleman*, 168 Ill. 2d 509, 523 (1996). Accordingly, defendant's contention of ineffective assistance of appellate counsel fails. See *Coleman*, 168 Ill. 2d at 523 (Ineffective assistance of appellate counsel claims are evaluated under the same standards that require a showing of deficient performance and resulting prejudice to the defendant.)

For the foregoing reasons, we affirm the circuit court.

Affirmed.

O'BRIEN, P.J., with NEVILLE, J., and STEELE, J., concurring.

APPENDIX B

FIFTH DIVISION
July 23, 2004

No. 1-03-0545

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. IRENE ROMANIUK, Defendant-Appellant.	)	Appeal from the Circuit Court of Cook County. No. 00 CR 25338 Honorable Thomas Fecarotta, Judge Presiding.

ORDER

Defendant, Irene Romaniuk, appeals her jury conviction for first-degree murder and her sentence of 45-years' imprisonment. Upon appeal, defendant contends that: (1) the trial court erroneously denied her motions to quash arrest and suppress evidence, including evidence recovered from her parked automobile and evidence recovered from her purse; and (2) the trial court erred, when it refused to allow defendant to ask potential jurors supplemental *voir dire* questions. We affirm.

At the hearings upon defendant's motions to quash arrest and suppress evidence, Investigator Nicholas Pecora testified that on September 28, 2000, he responded to a 911 call by Stephen Hudson. When Pecora arrived at Hudson's apartment in the Tanglewood complex in Arlington Heights, he saw the victim, Kristen Popelka, lying on her back in the kitchen. Pecora testified that evidence technicians found shoe prints containing a chevron pattern in the blood on the kitchen's tile floor, and a cosmetic fingernail containing blood. When Pecora asked Hudson who would want to harm the victim, Hudson responded that defendant, with whom he had recently broken off a relationship, was the only person. Hudson provided Pecora with defendant's photograph and told him that defendant drove a white, two-door Lexus.

Illinois State Police Sergeant Joseph Micci testified that he worked with the major case assistance team (MCAT) and was investigating the victim's murder. On September 28, 2000, Micci and another officer maintained surveillance of defendant's apartment building in Chicago. Micci parked across from defendant's assigned parking space, looking for a white Lexus. At approximately 3:20 p.m., Micci observed defendant and another woman, later identified as Carolyn Romaniuk, defendant's mother, walk from the gangway between two apartment buildings. Micci recognized defendant from the photographs provided to him. As the two women approached, Micci and his partner identified themselves and asked the

women if they could speak with them. Micci then asked both women for identification, and as defendant removed her license from her wallet, Micci noticed a medium size amount of cash, later determined to be $8,000, inside the wallet.

Micci returned defendant's license and stated that Arlington Heights police wanted to speak with her. When defendant asked why they wanted to speak to her, Micci responded that he did not know because his job was to maintain surveillance and to determine whether defendant would be willing to accompany him to the police station. Neither Micci nor his partner revealed to defendant they were investigating a homicide. When defendant asked if she could call her father, Micci told her that he did not have a phone with him. He did not realize that defendant had a cell phone in her purse. Micci agreed to defendant's request that her mother accompany her to the police station.

Micci then asked defendant why she did not park in her parking space and defendant replied that parking was tight when she arrived home and the only spot to park was on Rascher Street, a street one block north that was accessible through the gangway. When two other officers arrived, Micci walked to where defendant parked her car, which was not visible from where defendant and her mother were standing. Micci testified that he never opened the car or trunk, and that he instructed the other officers not to touch the car.

Micci testified that neither he nor any other officer told defendant that she had to go to the police department, and defendant and her mother entered the unmarked, uncaged car without assistance. The doors remained unlocked. Micci told the transporting officers to place the purses of defendant and her mother into the trunk because of the money contained in defendant's wallet. Defendant kept the keys to her car. Neither defendant nor her mother requested an attorney. When Micci checked the license plate on defendant's Lexus, he discovered the plate was registered to another vehicle, to defendant's husband.

Investigator Sales testified that he was working with the MCAT team on September 29,2000. He and Investigator Brady arrived at defendant's apartment building that day where they met with Micci and his partner, who were speaking with two females. Sales heard Micci ask defendant if she would accompany them to the police department and heard defendant's mother ask if she could go with defendant. Sales testified that no one grabbed defendant or her mother, or otherwise forced the women into the police car. Micci then gave Brady permission to look through defendant's purse, and Brady discovered the one hundred dollar bills. Defendant's purse and her mother's purse were placed in the trunk of the police car during transport to the police station. Sales stated that neither defendant nor her mother said they did not want to accompany the officers, and at

no time were the women handcuffed. No one in his presence conducted a patdown of the women.

Sergeant Brady testified that he transported defendant and her mother to the police station on September 29, 2000. He stated that before transport, he asked defendant if he could search her purse for safety purposes, and defendant consented. When he looked in the purse, Brady noticed a large amount of cash and asked why she had that amount of money. Defendant responded that the money was for her divorce. After finding no weapons, Brady placed defendant's purse in the trunk of his car.

Defendant testified at the hearing that on September 29, 2000, she and her mother were walking through the parking lot of defendant's apartment building when two officers approached them. They asked defendant if she was Irene Romaniuk and then asked for her identification, which they took from her. When defendant asked the officers what they wanted, they responded that they were investigating a homicide. The officers then told them to walk to the police car and the officers searched both of their purses. Defendant then stated that the officers patted her stomach and searched the pouch she was wearing, as well as her wallet inside the pouch. Defendant asked the officers if she could call her father or her divorce attorney on the cell phone they found in her purse, but they refused permission. Another officer grabbed her right hand and forced her into the car.

Mrs. Romaniuk, defendant's mother, also testified at the hearing. She testified that one of the officers took defendant's car keys and announced that he was going to search defendant's car. She observed the officer open the trunk of the car, search the trunk and then enter the car on the driver's side. Mrs. Romaniuk stated that when two other officers arrived, they patted down defendant and searched the pouch she wore under her sweatshirt. The police then placed the purses and the pouch into the police car trunk. Mrs. Romaniuk testified that one of the officers grabbed defendant by the arm and told her that she was coming with them, and then told Mrs. Romaniuk that she could accompany them. When they arrived at the police station, she and defendant were placed in separate rooms. Mrs. Romaniuk stated that she saw one bandaid on defendant's finger, and she did not recall seeing it on her finger the day before.

After the hearings, the trial court denied defendant's motions to quash arrest and suppress evidence obtained from her purse and her Lexus.

At trial, Hudson testified that on September 28, 2000, he lived in the Tanglewood apartment complex with the victim, Kristen Popelka. In May or June, 2000, however, Hudson had also developed a relationship with defendant. In August, 2000, while he and defendant were having lunch at a restaurant, Hudson encountered defendant's husband, Tom Truduj. Hudson had not known that defendant was married. After the encounter, Hudson attempted to break off

his relationship with defendant, but defendant called him on his cell phone all day and told him, "Nothing is going to get between us. If she gets between us, I'll gut that bitch." Hudson testified that when he returned to the apartment at approximately 10 a.m. on September 28, 2000, he found the victim lying on the kitchen floor, covered in blood with something over her face.

Angel Salinas, a neighbor of the victim, testified that at approximately 7:30 to 7:40 a.m. on September 28, 2000, he heard the entrance door open. When he opened the door of his apartment, he saw a blond female who was dressed in blue jogging clothes and a cap walk by the apartment. A couple of minutes later, Salinas heard screams coming from the victim's apartment. When he went to the door of the victim's apartment, he heard a female voice saying, "How much money do you want?" in a low, dying voice.

Christina Sobczyk testified that she and defendant have been friends for six months. During the second week of September, 2000, Sobczyk was a passenger in defendant's car when defendant drove to the victim's apartment complex to confront the victim about her relationship with Hudson. Sobczyk described defendant's car as a white Lexus. Sobczyk also stated that defendant had once asked her whether she knew of anyone who could help defendant "take care of somebody." On the evening of September 27, 2000, Sobczyk was with defendant and at the time defendant's fingernails had a "french tip" and were in perfect condition.

Investigator Pecora testified at trial that he interviewed defendant at the police station on September 29, 2000. Pecora told defendant only that he was investigating an incident that occurred the day before, and that her name arose as someone who may have some information. After defendant summarized her activities on the previous day, she told Pecora, "I don't know what you want me to say, I didn't hurt anybody." Pecora had not told defendant anybody was hurt. Pecora also noticed that defendant sat with her right hand under her right thigh. After Pecora advised defendant of her *Miranda* rights, defendant stated that she was tired but agreed to speak with him.

Pecora asked defendant to show him her right hand, and defendant became reluctant. When defendant displayed her fingers, Pecora noticed that the right ring finger and middle finger had bandaids around the nail area, and that blood was oozing from under the bandaid. Pecora also observed the pinky and ring fingers of defendant's left hand had cosmetic nail applications that appeared to have been torn off. The other fingers on defendant's hands had a French manicure on the nails. When Pecora asked defendant what had happened to her fingernails, Pecora responded that she was injured in a "garbage disposal mishap." Pecora told defendant that a cosmetic fingernail that appeared to match defendant's french manicured nails was found at the crime scene, and defendant stated she and Hudson frequently wrestled in the apartment and she lost many fingernails as a

result. Pecora gave defendant her *Miranda* rights and she was placed under arrest.

Micci and Brady also testified at trial, and their testimony was substantially the same as the testimony they gave at the hearings on defendant's motions to quash arrest and suppress evidence.

A cosmetic fingernail recovered from the scene, as well as a kitchen tile and front door knob tested positive for blood. A piece of tissue paper found in defendant's Lexus also tested positive for blood. DNA testing performed upon the evidence revealed the DNA on the tissue paper matched the victim's DNA profile. The DNA on the exterior of the cosmetic fingernail matched the victim's profile, and the interior of the fingernail contained a DNA mixture consistent with the profiles of the victim and defendant. The door knob contained a DNA mixture consistent with defendant's profile.

Dr. Joseph Cogan performed the autopsy upon the victim which revealed that she suffered 45 injuries to her head and neck consistent with having been made by the claw of a hammer. The victim's teeth were chipped, and she had other penetrating wounds similar to stab wounds on her body. Dr. Cogan stated the victim died as a result of multiple injuries and the manner of death was homicide.

Dr. Alexander Obolsky, a privately retained psychiatrist, testified for the defense. Dr. Obolsky concluded that defendant suffered from depressive, personality, anxiety and chronic pain disorders.

Although Dr. Obolsky concluded defendant was not insane on September 28, 2000, she did have an unreasonable belief of self-defense and experienced sudden and intense passion as a result of the victim's provocation.

In rebuttal, the State called Susan Messina, a clinical psychologist employed by Cook County forensic clinical services. After interviewing defendant and reviewing papers, Messina concluded that defendant suffered from an adjustment disorder with mood anxiety and depressed mood. Messina found no evidence of abuse. She also opined that defendant was not acting in self-defense at the time of the incident and defendant gave no indication she felt her life was in danger or she feared for her safety. Defendant did not suffer any injuries from the victim.

The jury found defendant guilty of first-degree murder and the trial court sentenced defendant to 45-years' imprisonment. Defendant filed this timely appeal.

Defendant argues the trial court erred when it denied her motions to quash arrest and suppress evidence obtained from her purse and her Lexus. Reviewing courts give great deference to a trial court's factual and credibility determinations regarding motions to suppress, and will reverse the trial court on these matters only if its findings are manifestly erroneously. *People v. Love*, 199 Ill. 2d 269, 274 (2002). However, reviewing courts apply the *de novo* standard of review to the ultimate question of

whether the trial court erred in denying defendant's motion to suppress. *People v. Calderon*, 336 Ill. App. 3d 182, 191 (2002).

First, defendant contends the trial court erred when it denied her motion to quash her arrest. An arrest made without a warrant or probable cause violates a person's fourth amendment right to be free from unlawful searches and seizures. *People v. Melock*, 149 Ill. 2d 423, 436 (1992). A person is "'seized' within the meaning of the Fourth Amendment only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *People v. Bolden*, 197 Ill. 2d 166, 180-81 (2001), quoting *United States v. Mendenhall*, 446 U.S. 544, 553-54, 64 L. Ed. 2d 497, 509, 100 S. Ct. 1870, 1877 (1980). Some factors to consider in determining whether one has been seized are the presence of multiple officers, display of weapons, touching by officers, use of language suggesting the person is compelled to obey, and occurrences of practices normally associated with being arrested such as searching, handcuffing and fingerprinting. *Bolden*, 197 Ill. 2d at 181.

Defendant contends she was seized without probable cause when police officers approached her and her mother in the parking lot of her apartment complex. In ruling upon defendant's motion, the trial court found the testimony of the police officers credible, and this finding is not manifestly erroneous. The officers testified that they asked defendant if she would accompany them to the station, to which she

agreed, and then she asked if her mother could go with her and the officers honored defendant's request. Although defendant asked to call her father, she did not ask to use her own cell phone. Defendant was placed in the back of a detective car, which had no cage and was not locked. No force was used to get defendant or her mother into the car, and defendant was not patted down or handcuffed prior to her transport to the station. Officers placed defendant's purse in the trunk of the police car for safety and safekeeping purposes. Considering the totality of the circumstances, defendant was not seized without probable cause when she first encountered the officers in the parking lot, but rather, voluntarily accompanied the officers to the station. See *People v. Ollie*, 333 Ill. App. 3d 971, 982 (2002) (the court found that despite the fact that officers patted down the defendant before transport and did not ask defendant if he wished to provide his own transportation to the station, given the totality of the circumstances the defendant was not under arrest when he first accompanied officers to the station).

Next, defendant contends the police improperly seized her Lexus, and the trial court therefore erred in denying her motion to suppress evidence obtained therefrom. We need not address whether the police improperly seized the Lexus, as the only evidence recovered from there and introduced at trial was a piece of tissue paper that contained a blood stain consistent with the victim. Clearly, the bloody tissue paper found in the defendant's Lexus was evidence

tending to show defendant killed the victim. However, error, if any, in denying the motion to suppress and admitting the bloody tissue paper was harmless, where the identity of the victim's murderer was not at issue; defense counsel conceded at trial that defendant killed the victim.

Defendant also contends police improperly seized her purse, and the trial court erred in denying her motion to suppress the $8000 in cash recovered therefrom. Officer Brady testified that defendant gave him permission to search her purse, at which time he discovered the cash inside. Officer Brady testified he then placed the purse in the trunk of his squad car for safekeeping purposes. Officer Brady testified he "made sure" that defendant saw him put the purse in the trunk and that he told her they would take the purse out once they got to the police station. Officer Pecora testified that at the police station, the purse was placed on the floor adjacent to the room in which defendant was interviewed.

The trial court found Officer Brady's and Officer Pecora's testimony to be credible, and determined that no seizure occurred as defendant voluntarily gave the officers her purse. The trial court's finding is not manifestly erroneous.

Next, defendant argues the trial court erred by refusing to ask certain voir dire questions relating to the jurors' expectations as to whether defendant should testify, the dating habits of the victim and

defendant, abortion, personality disorder, and abusive relationships.

Supreme Court Rule 431 governs *voir dire* in criminal cases and provides:

> "(a) The court shall conduct voir dire examination of prospective jurors by putting to them questions it thinks appropriate, touching upon their qualifications to serve as jurors in the case at trial. The court may permit the parties to submit additional questions to it for further inquiry if it thinks they are appropriate and shall permit the parties to supplement the examination by such direct inquiry as the court deems proper for a reasonable period of time depending upon the length of examination by the court, the complexity of the case, and the nature of the charges. Questions shall not directly or indirectly concern matters of law or instructions. The court shall acquaint prospective jurors with the general duties and responsibilities of jurors.
>
> (b) If requested by the defendant, the court shall ask each potential juror, individually or in a group, whether that juror understands and accepts the following principles:
>
> (1) that the defendant is presumed innocent of the charge(s) against him or her; (2) that before a defendant can be convicted the State must prove the defendant guilty beyond a reasonable

> doubt; (3) that the defendant is not required to offer any evidence on his or her own behalf; and (4) that the defendant's failure to testify cannot be held against him or her; however, no inquiry of a prospective juror shall be made into the defendant's failure to testify when the defendant objects.
>
> The court's method of inquiry shall provide each juror an opportunity to respond to specific questions concerning the principles set out in this section." 177 Ill.2d R. 431. The committee comments to this rule provide:
>
> "The new language is intended to ensure compliance with the requirements of *People v. Zehr*, 103 Ill. 2d 472 (1984). It seeks to end the practice where the judge makes a broad statement of the applicable law followed by a general question concerning the juror's willingness to follow the law." 177 Ill.2d R. 431, Committee Comments.

In *Zehr*, the defendant was charged with home invasion, burglary and aggravated battery. During jury selection, the defendant tendered the following three supplemental questions:

> "'1. If at the close of all evidence and after you have heard arguments of counsel you believe that the State has failed to sustain the burden of proof and has failed to prove the defendant guilty beyond a reasonable doubt, would you have any hesitation

whatsoever in returning a verdict of Not Guilty?

2. If the defendant, Mr. Zehr, decides not to testify in his own behalf, would you hold it against him?

3. Do you understand that the defendant is presumed innocent and does not have to offer any evidence in his own behalf, but must be proven guilty beyond a reasonable doubt by the State?'" *Zehr*, 103 Ill.2d at 476.

The circuit court refused to include defendant's supplemental questions in its *voir dire* examination of the jury. On appeal, the Illinois Supreme Court held that "although they need not have been asked precisely the form submitted, the subject matter of the questions should have been covered in the course of interrogation on *voir dire*." *Zehr*, 103 Ill. 2d at 477.

Here, the circuit court informed prospective jurors as a group about defendant's presumption of innocence, the State's burden of proof and that defendant does not have to present evidence or testify on her own behalf, and permitted defendant to question prospective jurors individually. This is all that Supreme Court Rule 431 requires. The circuit court's refusal to allow defense counsel to ask the precise supplemental questions defendant desired, which were redundant or tended to highlight aspects of defendant's case rather than bias, was not error. See *People v. Chamness*, 129 Ill. App. 3d 871, 874 (1984) (trial court did not err by refusing to ask questions that highlighted aspects of defendant's case

rather than bias); *People v. Kraus*, 318 Ill. App. 3d 774, 783 (2000) (trial court did not err by refusing to ask redundant questions.) Accordingly, defendant's contention of error is without merit.

For the foregoing reasons, we affirm the circuit court.

Affirmed.

O'BRIEN, J., with CAMPBELL, P.J., and NEVILLE, J., concurring.

APPENDIX C

SUPREME COURT OF ILLINOIS
CLERK OF THE COURT
SUPREME COURT BUILDING
SPRINGFIELD, ILLINOIS 62701 (217) 782-2035

September 30, 2009

Mr. Wayne E. Brucar
Brucar & Yetter, P.C.
316 W. Roosevelt Road, Suite 200
Wheaton, IL 60187

No. 108428 – People State of Illinois, respondent, v. Irene Romaniuk, petitioner. Leave to appeal, Appellate Court, First District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on November 4, 2009.